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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1983

MICHAEL ALBERT KALY,
Petitioner

-vs-

THE PEOPLE OF THE STATE OF MICHIGAN,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

Michigan Court of Appeals Nos. 58257 & 60173

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QUESTIONS PRESENTED

I

Whether petitioner's double jeopardy protection under the Fifth Amendment to the United States Constitution was violated when he was convicted of possession of a firearm in the commission of a felony and the underlying felony when by statutory definition the underlying felony could only have been committed by the use of a firearm.

II

Whether petitioner's double jeopardy protection under the Fifth Amendment to the United States Constitution was violated when he was tried a second time after the trial court granted petitioner a new trial on the basis that the prosecutor had deliberately made prejudicial statements before the jury of a testimonial nature because the prosecutor had failed to call a witness who could have testified to the facts supplied by the prosecutor.

III

Whether petitioner was deprived of due process and a fair trial under the 14th Amendment when the trial court in supplemental instructions told the jury that accident was not a defense to a charge of involuntary manslaughter after having told the jury in the court's main charge that accident was a defense to involuntary manslaughter and after petitioner's counsel had argued a theory of accident to the jury.

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JURISDICTION OF THE COURT

The opinion and judgment of the Michigan Court of Appeals is dated July 1, 1982 and it was entered on July 1, 1982. The opinion is unpublished.

A timely application for leave to appeal filed by petitioner in the Michigan Supreme Court was denied by Order of that Court dated May 19, 1983.

A timely application for reconsideration of the Order dated May 19, 1983 filed by petitioner in the Michigan Supreme Court was denied by Order of that Court dated August 15, 1983.

Jurisdiction to review the judgment of the Michigan Court of Appeals, it is believed, is conferred upon this Court by *28 USC 1254*.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment 5, United States Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 14, Section 1, United States Constitution:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case originated in the Circuit Court for the County of Wayne, State of Michigan, seated in the City of Detroit, Michigan, a court of general jurisdiction including jurisdiction over felonies committed in the County of Wayne.

Petitioner was initially charged in a two-count information filed in this case with the commission of the offenses of (1) murder of the second degree in the shotgun slaying of one Daniel John McDonald; and (2) possession of a firearm in the commission of a felony.

The case was tried to a jury and petitioner was convicted of the offenses of (1) manslaughter and (2) possession of a firearm in the commission of a felony.

On petitioner's motion for a new trial, the trial court granted petitioner a new trial.

On petitioner's second trial, petitioner was faced with the charges of (1) manslaughter and (2) possession of a firearm in the commission of a felony. The second trial was tried to a jury.

The jury convicted petitioner, not of manslaughter, but of involuntary manslaughter under a statute known as *Michigan Compiled Laws Annotated 750.329* which stated that if a person pointed or aimed any firearm at another intentionally but without malice and the firearm discharged the ensuing death was manslaughter. And the jury also convicted petitioner of possessing a firearm in the commission of a felony.

Petitioner filed a post-conviction motion in the trial court praying the vacation of his conviction for possession of a firearm in the commission of a felony for the reason that petitioner's right under the double jeopardy clauses of the constitution of the State of Michigan and of the federal constitution was violated when he was convicted of both involuntary manslaughter under *MCLA 750.329* and of possession of a firearm in the commission of a felony under

MCLA 750.227b since the elements of both crimes of which he was convicted were the same and petitioner was subjected to a mandatory two-year prison term on the felony firearm conviction which mandatorily ran consecutively to any sentence imposed for the involuntary manslaughter conviction.

The trial court granted petitioner's motion and entered an order vacating petitioner's conviction under the felony firearm statute, *MCLA 750.227b*.

The trial court sentenced petitioner to a term of 5 years to 15 years on the involuntary manslaughter conviction.

Petitioner appealed his involuntary manslaughter conviction as a matter of right to the Michigan Court of Appeals.

The Michigan Court of Appeals granted the People of the State of Michigan leave to appeal from the order of the trial court vacating petitioner's conviction for felony firearm under *MCLA 750.227b*.

In an unpublished *per curiam* opinion dated July 1, 1982 in Docket Nos. 58257 & 60173, the Michigan Court of Appeals affirmed petitioner's conviction for involuntary manslaughter under *MCLA 750.329* and remanded the case 'to the Wayne County Circuit Court with directions to reinstate defendant's felony-firearm conviction and for resentencing'.

The trial court granted petitioner's motion to hold in abeyance resentencing under the mandate of the Michigan Court of Appeals until at least the Michigan Supreme Court ruled on petitioner's application for leave to appeal.

Petitioner filed an application for leave to appeal from the opinion and judgment of the Michigan Court of Appeals in the Michigan Supreme Court, and this application was denied by Order dated May 19, 1983.

Petitioner then filed a motion for reconsideration of the Order of May 19, 1983 in the Michigan Supreme Court, and this motion was denied by Order dated August 15, 1983.

At date hereof, petitioner has not been sentenced on the felony firearm conviction. Sentencing has been set for October 6, 1983.

STATEMENT OF PERTINENT FACTS

Petitioner was initially charged in a two count information in this case with the commission of the offenses of (1) murder of the second degree in the shotgun slaying of one Daniel John McDonald; and (2) possession of a firearm in the commission of a felony.

The case was tried to a jury and petitioner was conivcted of (1) voluntary manslaughter and (2) possession of a firearm in the commission of a felony.

Petitioner moved the trial court for a new trial on the basis that the prosecutor had deliberately made statements of a testimonial nature prejudicial to the petitioner in his argument to the jury. The trial court granted petitioner's motion for a new trial.

Prior to the second trial, petitioner filed a motion to dismiss the information on the basis that retrial of petitioner would violate his right under the 5th Amendment to the United States Constitution not to be placed twice in jeopardy for the same act. Petitioner's theory was that the grant of a new trial was procedurally equivalent to the court's granting of petitioner's motion for a mistrial made on trial on the same basis as the new trial motion and since the prosecutor's action was deliberate and designed to force a mistrial, retrial of petitioner was barred under the double jeopardy clause. The trial court denied this motion.

On petitioner's second trial, petitioner was faced with the charges of (1) voluntary manslaughter and (2) possession of a firearm in the commission of a felony.

The second trial was to a jury.

Evidence was adduced that petitioner was a businessman without any criminal record whatsoever. He owned and conducted a bar business. On the morning in question, petitioner had closed the doors of his establishment in accordance with the dictates of law and his customers were consuming whatever beverages they had ordered prior to cut-off time. After the doors were closed and locked, deceased and a friend came pounding on the doors demanding admittance. Petitioner explained that the bar was closed and that they should go home. There was evidence that the deceased and his friend had locked their keys in their car and wanted a coat hanger in order to open the lock on the door of their car. The banging persisted; petitioner shouted through the doors several times that the bar was closed. Petitioner then heard noises outside which suggested to his mind that deceased and his friend were vandalizing his property in anger at having been refused admittance. Petitioner armed himself with a shotgun and went outside. He confronted the two and told them that the bar was closed and that they should go home. Petitioner testified that he had armed himself because he did not know who it was who had been trying to get into the bar and he didn't know their purpose which might have been to rob him and his patrons, and that he was acting in defense of his person, of his patrons and of his property. During the confrontation, the shotgun discharged and deceased was struck and killed. Petitioner testified that he thought that the deceased was making a gesture toward him with an object in his hand and that petitioner jumped back to avoid danger and that the butt of the shotgun struck the wall of the building and that the shotgun went off killing deceased. Petitioner testified that the discharge of the shotgun was an accident.

The prosecutor asked for jury instructions on voluntary manslaughter and for instructions on the type of involuntary manslaughter defined under *MCLA 750.329*. Petitioner objected to instructions on involuntary manslaughter under the statute unless the court agreed that accident was a defense to the charge of involuntary manslaughter under the statute

MCLA 750.329. The court agreed that accident was a defense to the charge under the statute and that the court would so instruct the jury.

Petitioner argued to the jury that petitioner was to be excused on all charges — voluntary manslaughter and involuntary manslaughter under the statute — because the discharge of the shotgun was accidental.

The court instructed the jury that accident was a defense to the charge of involuntary manslaughter under *MCLA 570.329*.

After deliberating a while, the jury returned to the courtroom and sought additional instruction on involuntary manslaughter. In supplemental instructions, the trial judge for the first time told the jury that accidental discharge of the shotgun was not a defense to the charge of involuntary manslaughter under the statute *MCLA 750.329*.

Five minutes later, the jury returned verdicts of guilty of (1) involuntary manslaughter under *MCLA 750.329*; and (2) possession of a firearm in commission of a felony.

REASONS FOR GRANTING THE WRIT

I

The Michigan felony firearm statute, *MCLA 750.227b*, reads as follows:

> '(1) A person who carries or has in his possession a firearm at the time he commits or attempts to commit a felony, except the violation of section 227 or 227a [carrying a concealed weapon and a licensed private guard carrying his firearm while off duty], is guilty of a felony, and shall be imprisoned for 2 years. Upon a second conviction under this section, the person shall be imprisoned for 5 years. Upon a third or subsequent conviction under this section, the person shall be imprisoned for 10 years.

'(2) The term of imprisonment prescribed by this section shall be in addition to the sentence imposed for the conviction of the felony or that attempt to commit the felony, and shall be served consecutively with and preceding any term of imprisonment imposed for the conviction of the felony or attempt to commit the felony.

'(3) The term of imprisonment imposed under this section shall not be suspended. The person subject to the sentence mandated by this section shall not be eligible for parole or probation during the mandatory term imposed pursuant to subsection (1).'

The statute under which petitioner was convicted of involuntary manslaughter, *MCLA 750.329*, reads as follows:

'Any person who shall wound, maim or injure any other person by the discharge of any firearm, pointed or aimed, intentionally but without malice, at any such person, shall, if death ensue from such wounding, maiming or injury, be deemed guilty of the crime of manslaughter.'

The intent of the Michigan legislature in adopting the felony firearm statute, *MCLA 750.227b*, was to deter the use of guns in the commission of felonies that might be committed with a gun but not necessarily committed with a gun. Robbery armed, murder, assault with intent to commit murder — all may be committed without the use of a firearm. The use of a firearm in the commission of such offenses enhances the danger to the public safety. All this was made clear by the Michigan Supreme Court in *Wayne Prosecutor* v *Recorder's Court Judge*, 406 Mich 374, 391 (1979):

'The language employed by the Legislature in the felony-firearm statute . . . leaves no doubt that the Legislature intended to make the carrying of a weapon during a felony a separate crime and intended that cumulative penalties should be imposed. The Legislature has clearly expressed its judgment that carrying a

> firearm during any felony which may, but need not necessarily, involve the carrying of a firearm, entails a distinct social harm inimical to the public health, safety and welfare which deserves separate treatment. In order to deter the use of guns, the Legislature has chosen to create a separate crime.'

It is clear from the opinion of the Michigan Supreme Court in *Wayne Prosecutor* that the intent of the Michigan legislature in adopting the felony firearm statute was to prescribe separate and consecutive punishment for the commission of a felony while in possession of a firearm when the committed felony does not from its very nature involve the carrying of a firearm.

For example, an armed robbery can be committed by assaulting another with a knife, or with a club, or with an axe. The legislature decided that such assaults where inherently less dangerous to life than an armed robbery involving an assault with a firearm, and the legislature prescribed an additional and consecutive punishment for the carrying of a firearm during the commission of a felony whose commission did not in the nature of the felony involve the carrying of a firearm.

That the Michigan legislature did not intend to include in its proscription in the felony firearm statute those felonies which necessarily involved the carrying of a firearm is found in the fact that the felony firearm statute specifically excepted from its provisions (1) the offense of carrying a pistol concealed on the person and (2) the offense of a licensed private guard carrying his pistol on his person while off duty — offenses which necessarily involved the carrying of a firearm.

The specie of involuntary manslaughter of which petitioner was convicted by statutory definition could only be committed by the use of a firearm. The statute — *MCLA 750.329* — specifically provides that 'Any person who shall wound . . . by the discharge of any firearm . . . if death shall ensue' be deemed guilty of manslaughter.

Hence, it is clear by the interpretation of the Michigan Supreme Court of the legislative intent behind the Michigan felony firearm statute that the legislature did not intend to prescribe separate and consecutive punishment for the possession of a firearm in the commission of a felony which necessarily involved the carrying of a firearm. This Court is 'bound to accept the [state] court's construction of that State's statutes', *Missouri* v *Hunter*, ___ US ___, 103 S Ct 673, 679 (1983).

In the case at bar, it is clear that the sentencing court will sentence petitioner to a separate and consecutive sentence of two years on the felony firearm conviction because the sentencing court is under mandate of the Michigan Court of Appeals to do so. [At date hereof, petitioner has not yet been so sentenced because the sentencing court held in abeyance the resentencing of petitioner under the judgment of the Michigan Court of Appeals until the Michigan Supreme Court ruled on petitioner's application for leave to appeal and this action was taken just a few days ago. The sentencing court has set resentencing for October 6, 1983.]

But the sentencing of petitioner to a consecutive two year term on the felony firearm conviction will violate the petitioner's rights under the Double Jeopardy Clause of the *Fifth Amendment*.

The Double Jeopardy Clause 'prevent[s] the sentencing court from prescribing greater punishment than the legislature intended', *Missouri* v *Hunter*, *supra*, at 103 S Ct 678.

Since the Michigan legislature did not intend to prescribe separate and consecutive punishment for the carrying of a firearm in the commission of a felony which necessarily involved the carrying of a firearm, the sentencing court is constrained by the principles of *Blockburger* v *United States*, 284 US 299, 304 (1932):

> 'The applicable rule is that where the same act or transaction constitutes a violation of two distinct statut-

> ory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.'

In the case at bar, to prove involuntary manslaughter under *MCLA 750.329* it was necessary to prove that the accused aimed a firearm without malice at another, the discharge of the firearm, the wounding of the other, and the ensuring death. To prove the felony firearm offense, it was necessary to prove that the accused carried a firearm, that he aimed it without malice at another, that it discharged, the wounding of the other and the ensuing death. But the carrying of the firearm was already contained in the aiming of a firearm at another. Hence, neither offense required the proof of a fact which the other did not.

The Michigan Court of Appeals disposed of the *Blockburger* issue as follows:

> 'The constitutional test of *Blockburger* v *United States*, . . . is satisfied because in order to convict defendant of involuntary manslaughter the prosecution would have to prove, (1) that the defendant wounded, maimed, or injured another person, (2) that he did so by the discharge of any firearm, (3) that the firearm was pointed or aimed, intentionally but without malice at such person, and (4) that such 'person died from the wounds inflicted. To convict the defendant of a felony-firearm violation, the prosecution was legally required to prove, (1) that defendant carried or possessed a firearm, and (2) that the firearm was carried or possessed during the commission of *any* felony or attempted felony. Despite the substantial overlap in the proofs required to establish these crimes. *Blockburger* and *Wayne Prosecutor* mandate our finding that there was no double jeopardy violation here.' Appendix, page 2a.

The same type of argument was considered and rejected in a double jeopardy context by this Court in connection with a similar District of Columbia statute in *Whalen* v *United States*, 445 US 684, 694 (1980).

II

On the first trial, one of the most hotly contested points was whether the deceased and his companion had inadvertently locked the keys of their car in the car. This point had a bearing on the purpose of the two men banging on the door of petitioner's place of business after closing hours.

An important question bearing on the point was whether a police officer who had responded to the scene after the shooting had used a tool to gain entry into the locked car and had found the car keys inside. The police officer or officers who allegedly performed this act were not called as witnesses by the prosecution. Instead, another police officer who was called testified that he had seen this act performed. Defense counsel on cross-examination asked the officer whether the observation of the entry into the car had been noted in his police report made of the investigation. The officer testified that it had. When challenged to find such entry in the police report, the officer testified that he could not find it in the police report.

In his argument to the jury, defense counsel made capital of this fact to support defendant's theory that the deceased had not inadvertently locked his keys in the car and had come to petitioner's door with other things in mind than to obtain a coat hanger to open the car door. In his rebuttal argument, the prosecutor told the jury:

> '[Defense counsel] goes into a big deal about the hanger and the key being locked in the car. Disregarding, of course, the testimony of the officer in charge of the case that stood right there when that key was removed. Gave him a report. Said, read it and find where that is in your report. And he had it in the report. And the officer read it and he couldn't find it . . . The report which I hold in my hand, which is Sergeant Lokuta's report, was shown to defense counsel as soon as he got off the stand, indicating quite clearly the evidence that the key was removed by another officer. Shown to him the minute he got off the stand.' (Trial Tr 88-89)

There was an immediate objection by defense counsel. A long colloquy ensued between court and counsel, all in the presence of the jury. The prosecutor expressed his purpose in making his challenged statements:

> 'I think when you have in the impression that the officer has stated that a report is in existence, that the defense knows is in existence, he creates an impression that doesn't exist, with full knowledge that it does, your Honor, I think it is a matter that should be corrected. I didn't know he was going to argue that to the jury, all of this missing evidence that he talks about.' (Trial Tr 115)

The trial court clearly established that the statements of the prosecutor were testimonial in nature, that the substance of his assertions were not matters of record, and that the prosecutor had deliberately gone beyond the record to counter defense counsel's argument. At the conclusion of the jury arguments, defense counsel moved the court to declare a mistrial. The motion was denied.

Petitioner filed a post-conviction motion seeking a new trial. The trial court granted the motion after making the following remarks, among others:

> 'Many times as I read this, however, I can't say that there was not a reference both before and after the instructions [curative], to the fact that the prosecutor had managed to refer to a matter that was not in evidence. And to this day, I can't account for why that was done, other than angry (sic), I suppose, over the perception of what defense counsel was saying to the jury. I don't know how to get around that, to tell you the truth. The most significant part of the case is whether or not the men went to the premises for the purpose of getting a hangar (sic), or whether they went there with belligerance, or something else. I suppose it is true that the witness who was supposed to retrieve the keys was not endorsed, and didn't testify. And it was the report that referred to the retriever of those keys, was the one about which the prosecutor informed the jury.' (Tr Extract of Motion, 2-3)

After the trial court granted petitioner a new trial, petitioner filed a motion to dismiss the information on double jeopardy grounds, petitioner's position being that the prosecutor had deliberately made his improper remarks to the jury in order to provoke a mistrial so that he could call on a second trial the two officers who had made the entry into the car and who the prosecutor had failed to endorse as witnesses on the first trial.

In support of his motion for dismissal, petitioner pointed out to the trial court that after the grant of the new trial, the prosecutor had indeed obtained an ex parte order of the court allowing the prosecutor to endorse as witnesses on the people's information the names of the two police officers who allegedly made the entry into deceased's car.

The trial judge denied petitioner's motion for dismissal.

On petitioner's second trial, the two police officers who were not called on the first trial were called on the second trial and testified adversely to defendant that they had forced entry into deceased's car and removed the keys therefrom.

Petitioner maintains that the granting of petitioner's motion for a new trial after the first trial on the same basis upon which petitioner moved for a mistrial was procedurally the same as though the trial court had granted the motion for a mistrial. Cf *Lee* v *United States*, 432 US 23 (1977) where the Court regarded a motion to dismiss as a motion for a mistrial.

Although petitioner's 'valued right to have his trial completed by a particular tribunal', *Wade* v *Hunter*, 336 US 684, 689 (1949) was not violated in petitioner's first trial, certain other rights of petitioner under the Double Jeopardy Clause of the Fifth Amendment which were peripherally touched upon in *Oregon* v *Kennedy*, ___ US ___, 102 S Ct 2083 (1982) were violated.

But petitioner urges to this Court that he cannot be deprived of those favorable consequences which would have flowed to him — a bar to a second trial, for example — which would have occurred had the trial court granted his motion for a mistrial during trial rather than his motion for a new trial simply because the trial court erred in the denying of petitioner's motion for a new trial.

Had the trial judge granted petitioner's motion for a mistrial, petitioner could have argued in bar of a second trial that (1) the prosecutor's action was deliberate and willful and done with intent to goad petitioner into moving for a mistrial, (2) the prosecutor's action was deliberate and willful and designed to prevent the acquittal of petitioner, (3) that the prosecutor's action was deliberate and willful and done with intent to cause a mistrial, and that the prosecutor's action was designed to obtain a second, more favorable opportunity to convict petitioner.

Thus, petitioner should be able under the circumstances of the case at bar to urge that he should not have been tried a second time because it is clear from the facts of the case that the prosecutor's statements to the jury were not inadvertent; they were made consciously, deliberately, with the specific intent of countering what the prosecutor perceived to be a devastating argument by defense counsel. The statements were made at the very end of the case in the prosecutor's rebuttal argument after all the evidence had been presented to the jury and after defense counsel had made his final argument to the jury. The intent of the prosecutor can be inferred and found to be a fact from the 'objective facts and circumstances' of this case, *Oregon* v *Kennedy*, *supra*, 102 S Ct at 2089, and that intent was to cause a mistrial.

The knowing, deliberate and willful making of the statements to the jury by the prosecutor loudly and clearly bespeak an intent to goad the petitioner into moving for a mistrial, and when the defendant in a case is goaded into moving for a mistrial, he may 'raise the bar of Double Jeopardy to a second trial', *Oregon* v *Kennedy*, *supra*, 102 S Ct at 2089.

It is clear from the facts and circumstances of this case that the prosecutor realized at the end of the trial that he had failed to adduce crucial testimony on behalf of the prosecution by not endorsing and calling the two police officers who made entry into the deceased's car, and that the prosecutor made his improper statements to the jury 'from a fear that the jury was likely to acquit the accused', *United States* v *Tateo*, 377 US 463, 468 n 3 (1964), quoted in *Oregon* v *Kennedy*, *supra*, 102 S Ct 2088, n 4.

'[W]here a defendant's mistrial motion is necessitated by judicial or prosecutorial impropriety designed to avoid an acquittal, reprosecution might well be barred', *United States* v *Jorn*, 400 US 470, 485 n 12 (1970), quoted in *Oregon* v *Kennedy*, *supra*, 102 S Ct at 2083.

From the fact that immediately after the granting of a new trial to petitioner the prosecutor endorsed the names of the two police officers who made entry into deceased's car on the people's information as witnesses for the second trial — the failure of the prosecutor to call whom on the first trial created in the mind of the prosecutor a desperate need to make the improper statements to the jury — it may be objectively determined that 'the bad faith conduct' of the prosecutor 'afford[ed] the prosecution a more favorable opportunity to convict' the petitioner, *United States* v *Dinitz*, 424 US 600, 611 (1976), quoted in *Oregon* v *Kennedy*, *supra*, 102 S Ct at 2088.

III.

Prior to final arguments to the jury, the court agreed, upon petitioner's request, to instruct the jury that accident was a defense to the charge of involuntary manslaughter under *MCLA 750.329*.

Defense counsel argued to the jury that deceased's death was accidentally caused.

The trial judge instructed the jury that accident was a defense of the charge of involuntary manslaughter.

After the jury had deliberated for some time, they returned to the courtroom and asked for further instructions. In a supplemental charge, the trial judge for the first time instructed the jury that accident was NOT a defense to the charge of involuntary manslaughter under *MCLA 750.329*.

This supplemental instruction so infected the trial with unfairness as to have deprived petitioner of due process and a fair trial under the *14th Amendment*. *Cupp* v *Naughten*, 414 US 141 (1974); *Cool* v *United States*, 409 US 100 (1972).

CONCLUSION

It is respectfully urged to this Court that the foregoing issues involve important questions of federal constitutional law that should be settled by this Court.

RELIEF SOUGHT

Petitioner respectfully prays this Court issue its Writ of Certiorari to the Michigan Court of Appeals.

Respectfully submitted,
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September 22, 1983

APPENDIX

Opinion of the Michigan Court of Appeals

STATE OF MICHIGAN
COURT OF APPEALS
(Filed July 1, 1982)

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

-v- No. 58257

MICHAEL ALBERT KALY,
Defendant-Appellant.

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

-v- No. 60173

MICHAEL ALBERT KALY,
Defendant-Appellee.

BEFORE: S.J. Bronson, P.J., D.F. Walsh and C.W. Simon*, JJ. PER CURIAM

After a second jury trial, defendant was convicted of involuntary manslaughter and felony-firearm and sentenced to serve from 5 to 15 years imprisonment. The trial court vacated Kaly's felony-firearm conviction on double jeopardy grounds. Both parties have appealed.

The first issue raised challenges the propriety of the trial court's dismissal of the felony-firearm conviction on double jeopardy grounds. We find that, on the basis of *Wayne County Prosecutor* v *Recorder's Court Judge*, 406 Mich 374; 280 NW2d 793 (1979), the trial court erred in vacating defendant's felony-firearm conviction. *People* v *Mahone*, 97 Mich App 192, 195; 293 NW2d 618 (1980).

The constitutional test of *Blockburger* v *United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932), is satisfied because in order to convict defendant of involun-

* Circuit judge, sitting on the Court of Appeals by assignment.

tary manslaughter the prosecution would have to prove, (1) that the defendant wounded, maimed, or injured another person, (2) that he did so by the discharge of any firearm, (3) that the firearm was pointed or aimed, intentionally but without malice at such person, and (4) that such person died from the wounds inflicted. To convict the defendant of a felony-firearm violation, the prosecution was legally required to prove, (1) that defendant carried or possessed a firearm, and (2) that the firearm was carried or possessed during the commission of *any* felony or attempted felony. Despite the substantial overlap in the proofs required to establish these crimes, *Blockburger* and *Wayne Prosecutor* mandate our finding that there was no double jeopardy violation here.

Next, defendant argues that the second trial, granted him on his motion for a new trial after an earlier conviction, placed him twice in jeopardy. We disagree because, after a full review of the record, we find that the ruling by the trial court was not a belated decision to grant a mistrial because of prosecutorial overreaching or bad faith. *United States* v *Dinitz*, 424 US 600, 606; 96 S Ct 1075; 47 L Ed 2d 267 (1976), *United States* v *Jorn*, 400 US 470, 485; 91 S Ct 547; 27 L Ed 2d 543 (1971).

Defendant next alleges that the trial court erred in refusing to instruct the jury that accident was a complete defense to a charge of involuntary manslaughter. Defendant's argument makes no sense as the gravamen of involuntary manslaughter is a culpable accidental killing. Where the weapon is intentionally aimed or pointed, its discharge is simply not excused by accident. *People* v *West*, 408 Mich 332, 343; 291 NW2d 48 (1980), *People* v *Richardson*, 409 Mich 126, 140-141; 293 NW2d 332 (1980), *People* v *Newman*, 107 Mich App 535, 547-548; 309 NW2d 657 (1981), Bronson, dissenting. The defense of accident in a criminal case charging involuntary manslaughter is available only as a defense to the element of intentionally aiming

or pointing a firearm, but not the discharge of the weapon. The instruction of the trial court was proper.

Defendant also argues that the trial judge changed his mind on the applicability of the accident defense. Our review of the record made at trial convinces us that the trial judge acted properly in instructing the jury. Here, defense counsel requested a jury instruction on accident as a defense to the crimes charged. There was a lengthy discussion as to the definition of accident and its applicability to the charge of negligent use of a firearm with injury or death resulting. After the trial judge agreed to defendant's definition of accident in this context, defense counsel asked the judge if he would instruct the jury that accident is a defense to voluntary manslaughter and involuntary manslaughter, to which the trial court responded affirmatively.

The prosecutor then proceeded to give his closing statement, arguing that if the defendant pointed the gun at the deceased intentionally and it happened to go off by accident, the defendant was guilty of involuntary manslaughter. Defense counsel objected to the argument by the prosecutor, to which the trial judge responded that the argument was a proper definition of involuntary manslaughter. Both counsel and the court argued:

"MR. PETRELLA: I did not now (sic know). I did not. I stated that—right from the involuntary instruction—where you conclude that if he intentionally pointed a gun at somebody and it accidentally went off, that it wouldn't be involuntary manslaughter? Of course, it would be. Of course, it would be. Of course, it would be.

"THE COURT: Well, involuntary manslaughter . . .

"MR. PETRELLA: Providing the other elements were fulfilled.

"MR. ZIEMBA: What is the Court going to instruct the jury? That accident is a defense. I thought we had that all hammered out.

* * *

"[THE COURT]: Accident is not a defense to the extent that this crime requires the defendant to intentionally point or aim the firearm at the deceased.

"MR. ZIEMBA: Then your Honor has changed his mind?

"THE COURT: I haven't changed my mind. About what?

"MR. ZIEMBA: I thought we had agreed that accident is, according to that definition which I gave to the Court, that accident was a defense to all three of the charges upon which the Court will instruct the jury. I thought we had that all agreed upon.

"THE COURT: Well, only to the extent that the absence of accident is required by this definition.

"What he was telling the jury is that as long as he intentionally points the firearm at the deceased, it doesn't matter if it goes off by accident. There is still involuntary manslaughter."

Defense counsel then argued to the jury in his closing statement that the gun accidently discharged when the defendant jumped back to get out of the way of the deceased who was coming at him with a brick. Counsel also argued that the gun was not necessarily pointing or aimed, although not using those terms, at the deceased at the time of the shooting. In fact, defense counsel argued that perhaps the deceased was bent over at the time of the gun's discharge.

We find that the trial judge was correct and that the judge and prosecutor were in agreement from the beginning as to the correct definition of involuntary manslaughter and the use of accident as a potential defense. We find no error.

Finally, we find no error in the trial court's instruction to the jury supporting defendant's theory of the case. The trial judge properly recognized the proffered instruction as pertaining to self-defense which was not an issue in the case before the jury. Our review of the record made in the trial court convinces us that the instructions, taken as a whole, were fair, balance and impartial.

On the basis that the trial court erred in vacating defendant's conviction of felony-firearm, the cause is remanded to the Wayne County Circuit Court with direction to reinstate defendant's felony-firearm conviction and for resentencing.

REMANDED.

Order of the Michigan Supreme Court
(Filed: May 19, 1983)

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 19th day of May in the year of our Lord one thousand nine hundred and eighty-three.

69763
69764

Present the Honorable
G. MENNEN WILLIAMS,
Chief Justice
THOMAS GILES KAVANAGH,
CHARLES L. LEVIN,
JAMES L. RYAN,
JAMES H. BRICKLEY,
MICHAEL F. CAVANAGH,
PATRICIA J. BOYLE,
Associate Justices.

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

MICHAEL ALBERT KALY,
Defendant-Appellant.

SC: 69763, 69764
COA: 58257, 60173
LC: 79-937139-FM

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because the Court is not persuaded that the questions presented should be reviewed by this Court.

512

STATE OF MICHIGAN—ss.

I, CORBIN R. DAVIS, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the

original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing this 19th day of May in the year of our Lord one thousand nine hundred and eighty-three.

(s) Corbin R. Davis
Clerk

Order of the Michigan Supreme Court
(Filed: August 15, 1983)

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 15th day of August in the year of our Lord one thousand nine hundred and eighty-three.

69763
(41)
69764
(36)

Present the Honorable
G. MENNEN WILLIAMS,
Chief Justice
THOMAS GILES KAVANAGH,
CHARLES L. LEVIN,
JAMES L. RYAN,
JAMES H. BRICKLEY,
MICHAEL F. CAVANAGH,
PATRICIA J. BOYLE,
Associate Justices.

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

MICHAEL ALBERT KALY,
Defendant-Appellant.

SC: 69763-4
COA: 58257, 60173

On order of the Court, the motion by defendant-appellant for reconsideration of this Court's order of May 19, 1983 is considered, and the motion is DENIED, because it does not appear that said order was entered erroneously.

0811

STATE OF MICHIGAN—ss.

I, CORBIN R. DAVIS, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the

Order of the Michigan Supreme Court
(Filed: August 15, 1983)

original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing this 15th day of August in the year of our Lord one thousand nine hundred and eighty-three.

(s) Corbin R. Davis
Clerk

Office - Supreme Court, U.S.
FILED
DEC 6 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-497

In the Supreme Court of the United States

October Term 1983

MICHAEL ALBERT KALY, Petitioner

-vs-

STATE OF MICHIGAN, Respondent

RESPONDENT'S ANSWER TO PETITION FOR WRIT OF CERTIORARI

Michigan Court of Appeals Nos.
58257 & 60173

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QUESTIONS PRESENTED

I

WERE PETITIONER'S DOUBLE JEOPARDY RIGHTS UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION VIOLATED WHEN PETITIONER WAS CONVICTED OF A VIOLATION OF MICHIGAN'S "FELONY FIREARM" LAW AND MANSLAUGHTER.

II

WERE PETITIONER'S DOUBLE JEOPARDY RIGHTS UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION VIOLATED WHERE PETITIONER WAS RE-TRIED AFTER THE TRIAL COURT GRANTED A POST CONVICTION MOTION FOR NEW TRIAL.

III

WAS PETITIONER DEPRIVED OF DUE PROCESS OR A FAIR TRIAL BASED ON THE INSTRUCTIONS GIVEN BY THE TRIAL COURT TO THE JURY WHICH DEALT WITH THE DEFENSES OF ACCIDENT AND SELF DEFENSE.

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JURISDICTION OF THE COURT

Petitioner is correct in asserting that the Michigan Court of Appeals decided petitioner's State appeal on 1 July 1982. Petitioner is also correct in asserting that the Michigan Supreme Court denied an Application For Leave To Appeal the Court of Appeals decision on 19 May 1983. Petitioner is also correct in asserting that an Application for Rehearing filed by petitioner in the State Supreme Court was denied by that Court on 15 August 1983.

Petitioner is incorrect however in asserting that the jurisdiction of this Honorable Court is properly invoked by 28 USC 1254. That section provides an appellate framework relating to an appeal or application for a Writ of Certiorari from a decision of a case in one of the Federal Court's of Appeals. A review of the statutory basis of jurisdiction cited by Petitioner reveals that that section does not create jurisdiction in this Honorable Court in this instant cause as Petitioner is seeking a writ from the Michigan Court of Appeals.

CONSTITUTIONAL PROVISIONS INVOLVED

The respondent accepts the Petitioner's citation of the involved Constitutional provisions.

STATEMENT OF THE CASE

The Respondent will accept Petitioner's Statement of the Case as being basically correct. The Respondent wishes to complete one aspect of the Statement however which is not fully presented by Petitioner.

Petitioner was originally tried on one count of Second Degree Murder (MCLA 750.317) and one count Possession of a Firearm During the Commission or Attempt to Commit a Felony (MCLA 750.227b). Petitioner was convicted of Manslaughter (MCLA 750.321) and Possession of a Firearm (MCLA 750.227b). A new trial motion was granted and petitioner was retried. He was again convicted of Manslaughter, but this time of Involuntary Manslaughter under a different manslaughter statute (MCLA 750.329) and of the Possession of a Firearm During the Commission of a Felony. The possible sentencing consequences for each type of manslaughter are identical.

STATEMENT OF PERTINENT FACTS

The Respondent will accept those facts presented by Petitioner as being basically correct. Petitioner does not however, present other material and relevant facts adduced during the course of his trial. The Respondent will now do so.

A friend of the deceased, Ernest Segura, who had been with him on the night of the fatal shooting testified that he and the deceased had been drinking that evening, that they had had a "few beers". They visited several bars and consumed alcohol at each of them. They ended up at the bar owned by the Petitioner here. Segura further testified that when they got to petitioner's bar, they left their vehicle and locked the keys inside it. Segura went to the door of petitioner's bar and knocked repeatedly asking for a coat hanger. The bar was closed at this

time. A voice inside the bar told him to go home. Shortly after that, the petitioner exited the bar. Segura again asked for a coat hanger, petitioner said that he was closed. At that point, petitioner told someone inside the bar to bring him his gun. Segura and the deceased went to their car. The petitioner exited the bar a second time and someone inside the bar handed him a gun. The petitioner then came fully out of the bar yelling, "I told you guys to go home". Segura again asked for a coat hanger at which time the petitioner "poked" the deceased in the chest with the firearm. The deceased fell against the car, stated that he didn't know why the petitioner was acting in the manner he was. At that point, the gun discharged. Segura testified that the petitioner raised the weapon chest high and fired it. The petitioner then carried the weapon back into the bar.

The medical/examiner testified that the deceased died from a gunshot wound to the neck.

A bar patron testified that he was inside the bar when "somebody kept beating on the door". The petitioner went to the door, engaged in a conversation with whomever was there, and then asked for his weapon. The petitioner left the bar, a shot was heard, and the petitioner reentered the bar, gave the weapon to this witness and told him to put it back. The petitioner then took the gun again and he and his wife left the bar through the back door. The petitioner then returned to the bar and told the witness to "don't say nothing, don't do nothing, keep my mouth shut, walk away".

Several other patrons testified in a similar manner. A barmaid testified that after the shot was fired the petitioner came back into the bar and said that nothing was wrong, "I just shot up in the air". This witness testified that the petitioner later told her that the shooting had been accidental because the shotgun had hit the wall; the petitioner then told her it had been accidental because the shotgun had dropped and hit the

ground. One police officer testified that when he responded to the scene, police had to use a special tool to enter the deceased's vehicle because the keys were inside it. A second officer testified that the petitioner told him that he, the petitioner, had thrown the weapon into the Detroit River. Police divers recovered the weapon from the river.

REASONS FOR DENYING THE WRIT

I

The petitioner first asserts that he is entitled to relief because he has been improperly convicted of involuntary manslaughter and possession of a firearm during the commission or attempt to commit a felony as prescribed by controlling Michigan law. (MCLA 750.329; MCLA 750.227b) Petitioner bases his argument on the double jeopardy clause of the Fifth Amendment to the United States Constitution.

Petitioner's argument simply stated is this: although a conviction for voluntary or involuntary manslaughter under MCLA 750.321 returned in conjunction with a conviction for possession of a firearm during the commission or attempt to commit a felony under MCLA 750.227b would not violate any double jeopardy right, a conviction of involuntary manslaughter under MCLA 750.329 coupled with a conviction of "felony firearm" would violate double jeopardy precepts. His argument is based on the wording of the involved state statutes.

MCLA 750.321 is the general Michigan manslaughter statute. It provides in relevant part that;

> Any person who shall commit the crime of manslaughter shall be guilty of a felony. . .

Manslaughter under this statute is not further defined. It is a common law offense and its elements are defined by case law

precedents within the State of Michigan. Case law has developed in the State of Michigan that "manslaughter" is of two separate and distinct types, "voluntary" and "involuntary". *People v Townes*, 391 Mich 578 (1974). The punishment for either offense is identical. There also exist however, several additional offenses involving the unexcused death of a human being that are also classified as "manslaughter", albeit, of a special type. One of these "special types" is involved in this instant case.

The present petitioner was convicted of involuntary manslaughter under MCLA 750.329 which provides in relevant part that;

> Any person who shall wound, maim, or injure any other person by the discharge of any firearm, pointed or aimed, intentionally but without malice, at any such person, shall, if death ensue from such wounding, maiming or injury, be deemed guilty of the crime of manslaughter.

The "felony firearm" statute provides in relevant part that;

> A person who carries or has in his possession a firearm at the time he commits or attempts to commit a felony. . . is guilty of a felony.

Numerous State appellate challenges have been brought on double jeopardy grounds in an attempt to obtain a finding that the felony firearm statute violates double jeopardy provisions. The Michigan Supreme Court has rejected those challenges. *Wayne County Prosecutor v Recorder's Court Judge*, 406 Mich 374 (1979); Reh. Den., 406 Mich 1127 (1979). In this last cited case, a petition for certiorari was denied by this Honorable Court, *Brintley, et al v Michigan*, 444 US 937, 100 S. Ct. 417, 62 LEd2d 317 (1979). The petition for certiorari was dismissed for want of a substantial federal question.

A related question recently arose in *Missouri v Hunter*, ____ US ____, 103 S. Ct. 673, 74 LEd2d 535 (1983). In that case a

state defendant had been tried and convicted of "first degree armed robbery" and "armed criminal action" based on the commission of the armed robbery. The appellate assesstion was a violation of the double jeopardy clause. The Supreme Court found no such violation.

After an analysis of the applicable state statutes and prior decisions by the Supreme Court (specifically, *Whalen v United States*, 445 US 684, 100 S. Ct. 1432, 63 LEd2d 715 (1980); *Blockberger v United States*, 284 US 299, 52 S. Ct. 80, 76 LEd 306 (1932); and *Albernaz v United States*, 450 US 333, 101 S. Ct. 1137, 67 LEd2d 275 (1981)), the Court decided that (citing Albernaz, supra);

> Where Congress intended, as it did here, to impose multiple punishments, imposition of such punishments does not violate the Constitution. (543)

This Court went on to note that;

> ... simply because two criminal statutes may be construed to proscribe the same conduct under the Blockberger test does not mean that the Double Jeopardy Clause precludes the imposition, in a single trial, of cumulative punishments pursuant to those statutes.
>
> • • •
>
> Here, the Missouri Legislature has made its intent crystal clear. Legislatures, not courts, prescribe the scope of punishments.
>
> Where, as here, a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the "same" conduct under Blockberger, a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial. (544)

This Honorable Court earlier in the same opinion noted that, "We are bound to accept the Missouri Court's construction of that States statutes." (543)

In the present case, the Michigan Supreme Court has decided that felony firearm — associated felony convictions do not violate double jeopardy constraints. The Michigan Supreme Court has found the felony firearm statute to be constitutional. These rulings, in conjunction with the dismissal of the *Brintley* case, *supra*, and the decision rendered in *Hunter*, *supra*, effectively eviscerate petitioner's present argument.

What this petitioner seeks to do is to have this Honorable Court redetermine the intent of not only the Michigan Legislature in enacting the felony firearm statute (whose intent is clear on the face of the statute itself) but also of the Michigan Supreme Court as well by "reading in" to their statutory and case law decisions an intent that they did not express — notwithstanding that they were facially clear as to what their intent was. That result does not conform to present precedent as is noted above. See also *People v Elowe*, 85 Mich App 744 (1978); *People v Mahone*, 97 Mich App 192 (1980), Lv. Den., 411 Mich 922 (1980).

II

As his second argument, petitioner asserts that certain alleged prosecutorial misconduct at the first trial was intentional and that the granting of a new trial motion after conviction on that ground is the functional equivalent of the declaration of a mistrial. Inasmuch as that mistrial was declared out of a necessity to do so because of the intentional prosecution misconduct, so the argument flows, it is not a voluntary mistrial but one which should have precluded any retrial whatsoever.

Petitioner's argument runs afoul of the specific facts of this instant case.

During defense examination of the officer in charge of the case at the first trial defense counsel asked if the officer had written in *his* report that *another* officer at the scene used a special tool to open the deceased's vehicle to obtain his keys. The officer responded that he had written that in his report. He was, however, unable to find it when he reviewed his report.

During closing argument, defense counsel stressed this inability and attempted to portray the officer's testimony as having been given in bad faith and that all police reports were inaccurate and incomplete in this case; the officer making up the facts on the stand. The prosecutor responded in rebuttal argument by producing the report in which the above statement appeared and indicated to the jury that such statement did in fact exist. This report had never been placed into evidence.

During the discussion between both counsel and the court, it was determined that after the officer had left the stand he found the report with the special information in it and indicated to defense counsel its existence and the existence of the statement. The officer did not inform the prosecutor at that time.

Then, after both sides rested, defense counsel made his closing argument as indicated above. The prosecutor had in the meantime been apprised of the report and its contents and responded in his *rebuttal* closing argument as indicated above. Had the prosecutor wanted to deliberately interject impermissible matters and prejudice the jury why did he not so comment in his initial closing statement?

Upon a defense request for a mistrial, the court viewed the matters above and decided (correctly) that the defense argument had been misleading and the prosecutor's response was understandable, even if erroneous, under the circumstances. The motion for a mistrial was denied.

The record is thus clear; error by *both* the prosecution and defense required a new trial. This simple fact cannot mandate that defendant now goes free. If it did, then every time defense counsel goaded or baited the trial prosecutor into an intemperate remark possibly or potentially requiring reversal, justice would be totally subverted and the defendant would obtain a completely unjustified benefit. The law cannot be so blind as to allow or sanction such an outcome. If such a result obtains here, it will not be long before astute defense counsel begin to use this new-found "appellate parachute" to great effect. This result *cannot* find support. *People v Brocato*, 17 Mich App 277 (1969); *People v Milton*, 81 Mich App 515, 520 (1978).

What the trial court did, was direct that petitioner be given a new trial. This is in full accord with controlling Michigan case law.

In *People v Partee*, 410 Mich 871 (1980), the trial prosecutor had cross examined defendant about his financial status and the source of his income (which is clearly improper under Michigan case law) *and* argued to the jury facts not in evidence. That case represents a much more extreme case of "misconduct" than the present one where *both* defense and prosecution erred. The Supreme Court granted Partee a new trial *only*.

At the hearing of the Motion to Dismiss, the trial court heard oral argument, read briefs submitted by both counsel and denied defendant's motion. That court found:

(1) The new trial had been granted *not* because of prosecution error but because of the court's own misperception at trial of the nature of the curative instruction required.

(2) The court viewed the gravamen of the trial problem as one relating to the accusation of dishonesty on defense counsel's part.

(3) The prosecutor's error was not central to the case, was a peripheral issue at best. A cautionary instruction would have sufficed to cure whatever error there was.

(4) The problem arose due to its having been initiated by defense counsel, i.e., by the manner of his closing argument as it related to the nature and quality of police testimony. The issue was one of mere corroboration of eyewitness testimony.

(5) The prosecution error was harmless error on the specific facts of this case.

(6) Defendant's defense was a transparent assertion of self-defense and was an extremely difficult theory to accept on the specific facts of this case.

(7) The error was not central to a determination of guilt or innocence, and was of no real significance to the determination of guilt or innocence but, since it was an error and could have been cured by a cautionary instruction but was not, the court would give the benefit of the doubt to the defendant and grant a new trial.

The trial court was correct in these perceptions and findings. The record below establishes that there is no double jeopardy claim here with any merit — but merely an attempt to evade criminal responsibility.

III

As his third argument, petitioner asserts that the trial court in effect "changed horses in mid-stream" by first instructing the jury that accident was a defense to the charged manslaughter and then, on re-instruction them that it was not.

Petitioner again misreads the record below. The respondent will reproduce limited sections of the colloquy relating to

the instructions only to show the correct framework in which the instructions were given and to establish that there was no error present.

Defense counsel made it clear that defendant's only defense was accident. (V: 603). After some discussion as to how "accident" should be defined, counsel stated:

> MR. ZIEMBA: Accident is an inadvertent happening unmotivated by any bad intent by the actor and not attributable to acts which could have been foreseen and should have been foreseen by the actor as probably leading to some injury to some person, you see.
>
> • • •
>
> THE COURT: Wait a minute. Let me stop you there. If that is what you mean by accident, then I agree one hundred percent, that accident — sure, it's a defense.
>
> • • •
>
> THE COURT: And I will use that definition.
>
> • • •
>
> THE COURT: It certainly is with this definition of accident.
>
> My concern was that the term accident is often, and I suggest it is often used by laymen, to include the concept of negligence.
>
> But this definition, since it does not include that concept, in fact, tends to negate negligence, certainly would be a defense.
>
> Let me point out that it is a defense only in the sense that it negates one or more of the necessary elements of the offense.

MR. ZIEMBA: Now, will the Judge — will the Court instruct the jury that accident is a defense to voluntary manslaughter and involuntary manslaughter?

THE COURT: It would be a defense to all of these.

MR. ZIEMBA: Yes.

THE COURT: Certainly.

The "ground rules", based on a definition supplied by defense counsel, were thus set.

At the end of initial closing argument, defense counsel had objections to what the prosecutor said relating to accident.

MR. ZIEMBA: What is the Court going to instruct the jury? That accident is a defense. I thought we had that all hammered out.

• • •

THE COURT: . . . I am going to read the instructions as they are in 16-147.

Accident is not a defense to the extent that this crime requires that defendant intentionally point or aim the firearm at the deceased.

MR. ZIEMBA: Then your Honor has changed his mind?

THE COURT: I haven't changed my mind. About what?

MR. ZIEMBA: I thought we had agreed that accident is, according to that definition which I gave to the Court, that accident was a defense to all three of the charges upon which the court will instruct the jury. I thought we had that all agreed upon.

THE COURT: Well, only to the extent that the absence of accident is required by this definition.

What he was telling the jury is that as long as he intentionally points the firearm at the deceased, it doesn't matter if it goes off by accident. There is still involuntary manslaughter.

Do you disagree with that?

MR. ZIEMBA: Absolutely I do. There's . . .

The court's instructions to the jury read as follows (in relevant part):

It is the defense asserted, claimed by the defendant in this case, as regards all of the crimes charged, is what we sometimes call the defense of accident. That term as I'm using it has a fairly precise meaning.

It means an inadvertent happening occurring without any wrongful or bad intent and not attributable to acts which could have been foreseen by the actor as causing injury to anyone.

We say that this is a defense in this case. It is really kind of the negative of certain things that are claimed by the People.

In other words, the People claim in various — according to the various crimes, that there was a certain intent involved, as I indicated to you, or that there was certain negligence involved.

This defense is a way of saying that neither of those are true. (V: 745-745).

This instruction was given in addition to, and subsequent to, the court's instructions relating to the elements of voluntary and involuntary manslaughter and to the People's burden of proof.

Third, that the defendant caused the death without lawful justification or excuse.

• • •

Third, that the defendant caused the death without lawful justification or excuse.

Defense counsel objected stating,

MR. ZIEMBA: But the important point is that your Honor never told the jury in so many words that accident is a perfect defense to all of the charges which the Court defined to the jury.

Your Honor never said to the jury, members of the jury, if you find established that the shotgun was accidentally discharged and the cause of death of the deceased, then you should find the defendant not guilty.

Your Honor should have gone on further to say, members of the jury, if you find that the prosecution has not proven beyond a reasonable doubt that the shotgun was not accidentally fired, if you have a doubt on that point, any reasonable doubt, then you must find the defendant not guilty also.

I am at a loss to explain to myself why the Court did not make that statement to the jury. This is the very heart of the crux of the defendant's defense. And I think that the jury should be clearly instructed in unequivocal language that accident is a perfect defense.

The trial court in response stated:

It is probably incorrect, however, to say that so-called accident would be a perfect defense to all of these crimes if by that it is mean in the claim of involuntary manslaughter, for example, that — if the defendant intentionally pointed or aimed a firearm at the deceased and it

was discharged by — the discharge was by accident and that all the other elements of the offense are there, that homicide is excused.

I believe that this is a statutory crime which specifically (sic) — apparently specifically contemplates that when a person points a firearm at a deceased and death results from the discharge of a firearm so intentionally pointed at the deceased, that the crime of involuntary manslaughter is committed.

So in that sense the charge would not be correct as requested by the defendant. It would be correct if, of course, the defendant pointed the firearm or aimed it at the deceased accidentally, to use that term, since the offense requires the intentional pointing of a firearm at the deceased.

The next issue raised was with regard to the Court's instruction on accident.

That the Court did not tell the jury that if the gun discharged accidentally, the defendant would not be guilty.

Well, as I have just said that is not literally true.

Under involuntary manslaughter, the accidental discharge of the weapon would constitute involuntary manslaughter provided that all the other elements of the offense are present.

The court, after having heard objections to the original charge, gave a limited set of supplemental instructions to the jury.

Then, one other item, in defining the crimes of voluntary and involuntary manslaughter just in case this — well, in the definition of both of those crimes — I stated in the case of voluntary manslaughter that the third element was that the defendant caused the death without justification or excuse, and involuntary manslaughter, one of the

elements similarly was that the defendant caused the death without lawful justification or excuse.

The excuse that is relevant, that the People must negate in this case is the excuse of accident, which I discussed with you in my instructions. And you will recall I did tell you that the mere fact that the defendant was raising accident as an excuse did not mean that the defendant had the burden of proving that something occurred by accident, but rather it was the obligation of the People to prove that the death was not caused by accident.

The prosecutor then objected stating that,

MR. PETRELLA: Your Honor, I highly object to the way the Court instructed on the accident and I think my objection could be founded just by the question that was asked by juror number ten in terms of the confusion that the jury sees relative to accident.

Now, the Court said that accident would be a defense to voluntary and involuntary manslaughter. Accident being defined as what?

Now, I would respectfully ask the Court just to clear up the problem so that the jury understands accident in this way.

Ladies and gentlemen, if you find the defendant accidentally pointed the gun and it went off, that would be legal justification or excuse as defined as one of the elements that the prosecution has to prove.

Further, if you find that the defendant intentionally pointed a gun at the deceased and then the gun accidentally discharged, this would not be legal justification or excuse, if you find that the defendant intentionally pointed the gun at the deceased.

This jury is thoroughly confused given the fact of the way you defined accident.

The court continued, after further discussion:

We are back to the accident question then. And all I can say is everything I read about the statute makes it seem — makes it plain to me anyway that it makes manslaughter out of an accidental discharge of a firearm which results in death so long as the pointing of the weapon was done intentionally.

MR. ZIEMBA: Then we should instruct according to the Prosecutor's suggestion, that if it's an accidental aiming it's not manslaughter.

THE COURT: Oh, certainly, absolutely.

MR. ZIEMBA: But the. . . .

THE COURT: That would also be consistent with the defendant's theory of the case.

MR. PETRELLA: Absolutely.

MR. ZIEMBA: You see, I don't think that the Legislature really meant to punish a person who lawfully, that is, lawfully points a gun at somebody, albeit intentional, and then has the weapon accidentally discharge.

* * *

THE COURT: I'm going to read them again. And when I get to the part about justification or excuse, I'm going to explain that excuse means accident. That the accident refers to the pointing of the weapon and not the fact of the discharge.

MR. PETRELLA: Very good, your Honor, that I think would cover counsel's point and mine.

MR. ZIEMBA: I agree that far. May the record reflect that I object to the Court's not instructing that an accidental discharge is. . . .

THE COURT: Certainly.

Upon re-instructing the jury, the court stated:

Third, that the defendant caused the death without lawful justification or excuse.

In the terms of this case the one that is applicable is excuse. The excuse that is applicable that the People must negate is the excuse of accident.

Now, this means accident with regard to the pointing of the weapon. It doesn't mean accident — that they've got to disprove accident in the discharge of the firearm.

What all this indicates is that the court *did* instruct on accident as a defense to the charged offenses, and even utilized the definition supplied by defense counsel. Petitioner's assertions on appeal that the court instructed the jury that accident was not a defense, are simply incorrect.

CONCLUSION AND RELIEF

It is respectfully submitted that the initial basis of jurisdiction of this Honorable Court does not exist as pointed out earlier. The respondent also asserts that even if the "merits" of the petitioners claims are addressed, there simply is no basis upon which relief may be granted to the petitioner. The Petitioner is for the most part challenging state law concepts and procedures which do not present a substantial federal question.

Wherefore, the respondent respectfully requests that this Honorable Court deny any and all requested relief of the Petitioner.

Respectfully submitted,

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